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No. 92-6281

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,
PETITIONER,

vs.

STATE OF UTAH,
RESPONDENT.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF UTAH

BRIEF OF *AMICUS CURIAE* UTE INDIAN TRIBE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE. ix

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 8

A. Introduction 8

B. Historical Perspective: The Indian Appropriations Acts of 1902, 1903, 1904 and 1905 12

C. There Is No Statutory Language of Termination, Abolishment or Cession in the Act Opening the Uintah Valley Reservation to Settlement by Non-Indians 16

D. The Federal Courts Correctly Determined that the Legislative History Reflects that Congress Had Abandoned any Intent to Disestablish the Uintah Valley Reservation by 1905 and Consciously Chose to Merely Make

the Unallotted Lands Available to Homestead and Townsite Entry 19

E. The Circumstances Surrounding the Opening of the Reservation Are Grossly Inconsistent and Must Be Resolved in Favor of a Finding that the Unallotted Lands Were Not Disestablished 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — Pages

A. Federal Cases

Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989) 10

Carpenter v. Shaw, 280 U.S. 363 (1930) 11

DeCoteau v. District County Court, 420 U.S. 425 (1975) 8, 9, 11, 16, 25

LaPier v. McCormick, 968 F.2d 303 (9th Cir. 1993) 5

Mattz v. Arnett, 412 U.S. 481 (1973) ..... Passim

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 11, 30

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). 5

Morton v. Mancari, 417 U.S. 535 (1974) 24

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 5, 10

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied, __ U.S. __, 111 S.Ct. 581 (1990) 6

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 27

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 24

Rosebud Sioux Tribe v. Kniep, 430 U.S. 584 (1977). 9, 10, 16, 25

Seymour v. Superintendent, 368 U.S. 351 (1962) 12, 17, 24

Solem v. Bartlett, 465 U.S. 463 (1984) 8-12, 18, 19, 29

Traynor v. Turnage, 485 U.S. 535 (1988) 24

United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957) 28

Ute Indian Tribe v. Utah, 521 F.Supp 1073 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986) ..... Passim

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) 7

B. State Cases

Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, 431 U.S. 901 (1977) 2

State v. Coando, 191 Utah Adv. R. 7 (1992) 4, 5

State v. Gardner, 827 P.2d 980 (Utah App. 1992) 5

State v. Hagen, 191 Utah Adv. R. 26 (1992) 4

State v. Perank, 191 Utah Adv. R. 5 (1992) ..... Passim

Statutes

Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-208 15

Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868, codified at 25 U.S.C. §§ 677-677aa 5

Act of June 17, 1892, ch. 120, 27 Stat. 52 . . . . . 18, 23

Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98. . . . . 14, 25

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 . . . . . Passim

Act of March 22, 1906, ch. 1126, 34 Stat. 80 17

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64 . . . . . Passim

Act of May 29, 1908, ch. 218, 35 Stat. 460 18

Executive Order of January 5, 1882 1

Executive Order of October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63 1

General Allotment Act of 1887, ch. 119, 24 Stat. 388 8

Indian Reorganization Act, 48 Stat. 984 (June 18, 1934) 1, 9

J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902) 14

Presidential Proclamation of July 14, 1905, 34 Stat. 3119; LD 108 . . . . . 26, 27

Regulations

51 Fed. Reg. 25,115 (1986) 5

Miscellaneous

11 Cong. Rec. 783, 934 (Jan. 20, 1881) 21

39 Cong. Rec. 3522 (Feb. 27, 1905); LD 103 22

Brief of Amicus Curiae Ute Indian Tribe, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993) 5

Brief of Appellee State of Utah, Ute Indian Tribe v. Utah, 773 F.2d 1087 (Nos. 81-1827 & 81-1901), cert. denied, 479 U.S. 994 (1986); Rec. Vol. XIX, No. 2 . . . . . 3, 4, 18, 26

Brief of Respondent in Support of Petition for Writ of Certiorari, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993) . . . . . Passim

Brief of the United States as
Amicus Curiae, Hagen v. Utah,
No. 92-6281, cert. granted, __
U.S. __, 113 S.Ct. 1840 (1993) 5

Consent Form of Uintah and White River
Utes (May 23, 1903); LD 164 25

Constitution of the Ute Indian Tribe 1, 4

H.Doc. 33 at 7, 58th Cong., 1st Sess.
(Dec. 1, 1903); LD 92 25

H.R. 17474, 39 Cong.Rec. 1180
(Jan. 21, 1905); LD 103 20-22

"Indian Appropriations Bill," 1906
Hearings, Subcomm. of the Sen. Comm.
of Ind. Aff., 58th Cong., 3d Sess.,
at 29-30 (1905); LD 100 . . . . . 21, 22

Petition of Appellee State of Utah
for Reconsideration, Ute Indian Tribe
v. Utah, 773 F.2d 1087 (Nos. 81-1827
& 81-1901), cert. denied, 479 U.S. 994
(1986); Rec. Vol. XIX, No. 22 3

Reply Brief of State of Utah,
State v. Perank, (No. 860243),
191 Utah Adv. R. 5 (1992) 5

S. 6897, 58th Cong., 3d Sess.;
LD 97 . . . . . 21, 22

S.Rep. No. 951, 57th Cong.,
1st Sess. 1, 3 (1902); LD 69 13

S.Rep. No. 4240, 58th Cong.,
3d Sess. 1, LD 102 22

§ 1-2-5, Ute Law and Order Code 10

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* Ute Indian Tribe is set forth in the Brief of Amicus Curiae Ute Indian Tribe in Opposition to the Petition for Writ of Certiorari at ii, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993). The written consent of the parties to the Tribe's participation in these proceeding as an *amicus* are reproduced id., App. A.

STATEMENT OF THE CASE

In 1861, President Lincoln set aside 2,046,080 acres of land in northeastern Utah as the Uintah Valley Reservation.[1] Eventually, the Uintah Valley Reservation, along with the adjacent Uncompahgre Reservation,[2] became the homeland of three then-autonomous bands of Ute Indians.[3]

At the turn of the century, Congress enacted a series of statutes that sought to open the Uintah Valley Reservation to settlement by non-Indians. In order to resolve this action, the Court must determine whether, by the Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64, as amended by the Acts of March 3, 1903, ch. 994, 32 Stat. 982, 997-98; April 21, 1904, ch. 1402, 33 Stat. 189, 207-08; and March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, Congress intended to disestablish

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[1] See Executive Order of October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63.

[2] The Uncompahgre Reservation was established by Executive Order of January 5, 1882. Today, the Reservations have been combined into the single "Uintah and Ouray Indian Reservation." However, only the boundaries of the Uintah Valley Reservation are at issue in this action. See Brief of Respondent in Support of Petition for Writ of Certiorari at 3, n.1, Hagen v. Utah, No. 92-6281, cert. granted, _ U.S. _, 113 S.Ct. 1840 (1993) [hereafter "State's Cert. Br. at __"].

[3] The formerly autonomous bands united to comprise the Ute Indian Tribe under § 16 of the Indian Reorganization Act, ch. 576, 48 Stat. 984, 987 (June 18, 1934). See Preamble, Constitution of the Ute Indian Tribe (approved Jan. 19, 1937).

more than half of the Reservation despite the Utes' steadfast and unanimous objections.

In 1975, the Ute Indian Tribe filed a declaratory judgment action in the Federal District Court for the District of Utah, seeking a determination on the very issue which is now before this Court. See Ute Indian Tribe v. Utah, 521 F.Supp 1073 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).[4] The United States, the Tribe, the State of Utah and the affected counties fully participated in the federal court proceedings. After 10 years of litigation, the federal courts concluded that the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, was the operative statute in opening the Uintah Valley Reservation to settlement, and that the 1905 Act did not disestablish the Reservation. See id.

The federal courts arrived at their decision after analyzing the relevant language of the Acts, the legislative history and surrounding circumstances, and the subsequent treatment accorded the Reservation by

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[4] Utah intimates that the reservation-boundary issue was first decided by the Utah Supreme Court in Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, 431 U.S. 901 (1977). See State's Cert. Br. at 2-3 (characterizing the reservation-boundary issue as having "surfaced" in federal court after the Utah Supreme Court had decided the issue). In fact, the Ute Indian Tribe litigation was initiated more than a year before the Utah Supreme Court decided Brough. Moreover, in deciding Brough, the Utah Supreme Court failed to apply this Court's clear analytical structure for determining when a reservation has been disestablished. See id. Instead, the Utah Supreme Court summarily concluded not only that the Uintah and Ouray Reservation, but also the *entire Ute Indian Tribe*, "no longer exist". Id. at 935.

Congress and the executive branch. See 521 F.Supp. at 1111-50; 773 F.2d at 1088-89.[5]

While the State's petition for a writ of *certiorari* to the Tenth Circuit in the Ute Indian Tribe litigation was pending in this Court, the State chose to relitigate the

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[5] The State of Utah chose not to appeal the federal district court's decision because:

> [t]he ultimate determination of the [district] court [] that . . . the Uintah [Valley] Reservation was not disestablished . . . was carefully reached after a deliberate and painstaking evaluation of thousands of pages of documents, after weighing the testimony of witnesses, after examining maps and photographs, and then by placing this giant mosaic of law and fact into historical and practical perspective. In so doing, *the [district] court was sensitive and obedient to all relevant guidance by the decisions of the U. S. Supreme Court* . . ..

Brief of Appellee State of Utah at 2-3, Ute Indian Tribe v. Utah, 773 F.2d 1087 (Nos. 81-1827 & 81-1901), cert. denied, 479 U.S. 994 (1986); Rec. Vol. XIX, No. 2 [hereafter "State's 10th Cir. Br. at __"] (emphasis added). Indeed, Utah opined that "it is virtually impossible for any party to present a persuasive argument to show that the district court committed reversible error." Id. at 2.

Moreover, Utah did not seek Tenth Circuit reconsideration of that part of the court's en banc decision finding that the Uintah Valley Reservation had not been disestablished, although the State did ask the Tenth Circuit to reconsider its decision with respect to two parcels not at issue in these proceedings. See Petition of Appellee State of Utah for Reconsideration, Ute Indian Tribe v. Utah, 773 F.2d 1087 (Nos. 81-1827 & 81-1901), cert. denied, 479 U.S. 994 (1986); Rec. Vol. XIX, No. 22.

reservation-boundary issue in state court.[6] To ensure that the State courts would reach the reservation-boundary issue, the State chose to relitigate that settled issue of federal law in three separate cases, each involving a different "category" of person alleging to be Indian. See State v. Perank, 191 Utah Adv. R. 5 (July 17, 1992) (State's Cert. Br. at 4a); State v. Hagen, 191 Utah Adv. R. 26 (1992) (State's Cert. Br. at 1a); State v. Coando, 191 Utah Adv. R. 7 (1992).[7]

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[6] The State's decision to relitigate the reservation-boundary issue in state court was made despite the district court's admonition to the State and other defendants in Ute Indian Tribe that "a refusal of their officers to recognize legitimate tribal *judicial* and governmental authority on the reservation is . . . state interference with tribal sovereignty," see 521 F.Supp. at 1157 (emphasis added), and the court's announced expectation that "this [c]ourt's judgment will be approached by all parties with a spirit of open-minded cooperation." Id. Although Utah cited the court's expectation approvingly to the Tenth Circuit, see State's 10th Cir. Br. at 5, it failed to heed the court's advice. At the same time that it was professing that it would cooperate with the federal courts' judgment, see id., Utah consciously undertook to interfere with the Tribe's and United States' judicial jurisdiction by prosecuting Indians for offenses committed on lands clearly within the boundaries of the Uintah Valley Reservation, as those boundaries had been confirmed by the federal courts. E.g., State v. Perank, 191 Utah Adv. R. 5 (1992); State's Cert. Br. at 4a.

[7] In Perank, the defendant was the biological child of an enrolled member of the Ute Indian Tribe. Although Perank was not a member of the Tribe at the time he committed his offense, the Utah Supreme Court found him to be "Indian" based upon a provision of the Tribe's Constitution that extends membership to any person who is the natural child of an enrolled member of the Tribe who lived on the Reservation at the time the child was born. See State v. Perank, State's Cert. Br. at 12a. Without discussion, the Utah Supreme Court
(continued...)

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[7](...continued)
assumed that Perank's parents lived on the Reservation when Perank was born. Id.

In Hagen, the case now before this Court, the defendant is an enrolled member of the Little Shell Band of Chippewa Indians, which is not among the tribes appearing on the Bureau of Indian Affairs' list of recognized tribes. See 51 Fed. Reg. 25,115 (1986). Adding support to the Tribe's contention that the reservation-boundary issue should never have been reached in this action, see Brief of Amicus Curiae Ute Indian Tribe at 40-45, Hagen v. Utah, No. 92-6281, cert. granted, __ U.S. __, 113 S.Ct. 1840 (1993); see also Brief of the United States as Amicus Curiae at 5, n.4, id., the Ninth Circuit Court of Appeals has recently held that a member of the Little Shell Band is not an Indian for purposes of criminal jurisdiction. See LaPier v. McCormick, 968 F.2d 303 (9th Cir. 1993).

In Coando, the defendant was a "mixed-blood Ute", whose legal status as an Indian was terminated pursuant to the Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868, codified at 25 U.S.C. §§ 677-677aa. Although terminated Utes are not Indian for purposes of criminal jurisdiction, see State v. Gardner, 827 P.2d 980 (Utah App. 1992), providing a basis for state jurisdiction regardless of the locus of the crime, cf. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973), the Utah Supreme Court elected to decide the Coando case on the basis that the Uintah Valley Reservation had been disestablished. See 191 Utah Adv. R. at 7.

The State did not seriously challenge any of the three defendants' assertions that they were Indian. In fact, in Perank (which was the State's first effort to relitigate the reservation-boundary issue in state court), Utah vehemently argued, contrary to the only tribe to which the defendant claimed any affiliation, that Perank *was* Indian. See Reply Brief of State of Utah, State v. Perank, (No. 860243), 191 Utah Adv. R. 5 (1992). Of course, the state courts would not need to address the reservation-boundary issue unless they first concluded that the defendants *were* Indian. See
(continued...)

Although the federal courts had already decided that the 1905 Act opened the Reservation and that the Act did not disestablish the Reservation, the Utah Supreme Court reached a contrary result. In a case involving "inadequate briefing", see State v. Perank, State's Cert. Br. at 64a (Zimmerman, J., dissenting), in which the United States and Tribe were not fully represented, the Utah Supreme Court wrongly concluded that the Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64, rather than the 1905 Act, opened the Reservation. The Utah Supreme Court determined that language in the 1902 Act restoring the unallotted lands to the public domain, standing alone, expressed an intent to terminate the affected lands' reservation status and that the 1902-Act language remained in effect despite numerous amendments to the Act. On the basis of these determinations, the court found, in diametric opposition to the federal courts that previously had considered the issue,[8] that the Uintah Valley Reservation had been disestablished.

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[7](...continued)
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that states have jurisdiction to prosecute non-Indians for offenses committed in Indian country).

[8] See Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1400 (10th Cir. 1990), cert. denied, _ U.S. __, 111 S.Ct. 581 (1990) (reaffirming that the 1905, rather than the 1902, Act opened the Uintah Valley Reservation); Ute Indian Tribe v. Utah, 521 F.Supp. 1073 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

This Court granted the petition for writ of certiorari to review the Utah Supreme Court's resolution of the reservation-boundary issue because it irreconcilably conflicts with the prior decisions of the federal courts on the same issue.[9]

SUMMARY OF ARGUMENT

The statutory language of the Act of March 3 1905, ch. 1479, 33 Stat. 1048, 1069-70, opening the Uintah Valley Reservation to settlement under the homestead and townsite laws, does not include clear language evincing a Congressional intent to diminish the Reservation boundaries. Rather than establishing by substantial and compelling evidence that Congress harbored an intent to disestablish the Reservation, the legislative history of the 1905 Act confirms that Congress purposefully abandoned any intent to disestablish the unallotted lands from the Reservation. Accordingly, pursuant to this Court's clear analytical structure for determining when a particular surplus land act merely opened a reservation to settlement by non-Indians and when such an act disestablished the unallotted lands from the affected Reservation, this Court must decide that the boundaries of the Uintah Valley Reservation were not diminished by the opening of the Reservation to settlement by non-Indians.

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[9] The Tribe hopes that, in reviewing the Utah Supreme Court's decision, this Court will be mindful of the State's "extraordinary machinations to resist federal law" and the "context of events forced" upon the Court, the Tribe and the United States by Utah in this action. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 696 n.36 (1979).

ARGUMENT

THE ACT OF MARCH 3, 1905, PROVIDED FOR THE SALE OF UNALLOTTED TRIBAL LANDS TO NON-INDIAN SETTLERS IN LANGUAGE AND UNDER CIRCUMSTANCES THAT REFLECT A CONGRESSIONAL INTENT TO LEAVE THE RESERVATION BOUNDARIES INTACT.

A. Introduction

During the 19th century, large sections of the western United States were reserved from the Indians' vast aboriginal territory as homelands for this Nation's indigenous Indian tribes. However, towards the end of the century, the policy in Congress changed from one of isolating Indians from, to one of assimilating Indians into, mainstream American society. The "wisdom" in Congress was that Indians "should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land." Solem v. Bartlett, 465 U.S. 463, 466 (1984). The shift in policy was reflected in the General Allotment Act of 1887, ch. 119, 24 Stat. 388. In that Act, the President had the discretion to make allotments of reservation lands to resident Indians and, with tribal consent, to sell the "surplus" unallotted lands to non-Indian settlers, with the proceeds from the sales being dedicated to the Indians' benefit. See DeCoteau v. District County Court, 420 U.S. 425, 432 (1975); Mattz v. Arnett, 412 U.S. 481, 496 (1973).

Because the President's authority under the General Allotment Act was discretionary, Congress often

enacted special legislation to ensure that a particular reservation was opened to settlement. Mattz v. Arnett, 412 U.S. at 481. Each of the special surplus land Acts employed its own statutory language, which was the product of a unique set of tribal negotiations and legislative compromise. See Solem v. Bartlett, 465 U.S. at 467.

Although the surplus land Acts contemplated the eventual termination of Indian reservations, this Court has unanimously held that the process of allotting reservation lands and opening the unallotted lands to non-Indian settlement is not inconsistent with continued reservation status.[10] See Mattz v. Arnett, 412 U.S. at 497. Therefore, the existence of a particular surplus land Act, alone, is not evidence of congressional intent to terminate a reservation. Id. at 496. However, the Court has acknowledged that, in a limited number of circumstances, Congress intended a particular surplus land Act to disestablish the opened area from the affected reservation. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

Congressional intent determines when a particular surplus land Act disestablished unallotted lands from a reservation and when such an Act simply offered non-Indians an opportunity to purchase lands opened for

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[10] The Court's reasoning seems especially sound because Congress repudiated the allotment and surplus land policy when it enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

settlement within the affected reservation.[11] See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977). "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." Solem v. Bartlett, 465 U.S. 463, 470 (1984). There is a strong presumption that Congress intended the opened lands to remain in reservation status. As the Court has explained:

> This Court does not lightly conclude that an Indian reservation has been terminated • • • The congressional intent [to terminate] must be clear, to overcome "the general rule that 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930). Accordingly, the Court requires that the "congressional determination to terminate . . . be *expressed on the face of the Act or be clear from the surrounding circumstances and legislative history*." Mattz v. Arnett, 412 U.S. at 505.

DeCoteau v. District County Court, 420 U.S. at 444 (emphasis added). On the other hand, under very limited circumstances, the Court will find Congress "*shared* the understanding that [a particular surplus land Act] would diminish a reservation" when:

> events surrounding the passage of a surplus land Act - particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative Reports presented to Congress - *unequivocally* reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation. . . .

Solem v. Bartlett, 465 U.S. at 471 (emphasis added). "To a lesser extent [the Court will also] look to events that occurred after the passage of a surplus land Act to decipher Congressional intent." Solem v. Bartlett, 465 U.S. at 471. However, there are limits to how far the Court will go to comprehend Congressional intent. Id. at 472. Unless the statutory language and the legislative history provide:

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[11] It must always be remembered that this is a jurisdictional dispute. Neither the Tribe nor the State has ever questioned who holds legal title to the lands at issue. Rather, the only dispute is whether *Indians* are subject to the laws of the Tribe and United States or of the State when they are on non-trust lands within the Uintah Valley Reservation.

The State has argued that resolution of the reservation-boundary question will subject non-Indians to tribal law. While a decision that the Reservation has been disestablished would subject *Indians* to the full panoply of *state* law for conduct on non-trust lands, a ruling that the non-trust lands remain a part of the Reservation would *not*, as the State suggests, subject non-Indians to the full complement of tribal laws. Decisions of this Court have severely restricted Indian tribes' authority over non-Indians. See Brendale v. Confederated Tribes of the Yakima Nation, 492 U.S. 408 (1989); Oliphant v. Suquamish Indian Tribe, 435 U.S. 119 (1978). Equally as important, the Ute Indian Tribe has disclaimed jurisdiction over non-Indians, except when their conduct directly affects the Tribe. E.g., § 1-2-5, Ute Law and Order Code.

> *substantial and compelling* evidence of a congressional intention to diminish Indian lands . . . this Court is bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Solem v. Bartlett, 465 U.S. at 472, quoting Mattz v. Arnett, 412 U.S. at 505; Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

B. Historical Perspective: The Indian Appropriations Acts of 1902, 1903, 1904 and 1905

Congressional efforts to open the Uintah Valley Reservation to non-Indian settlement, which were initiated in the 19th Century, were renewed in 1902.[12] Pursuant to the Indian Appropriations Act of 1902, Congress provided that, with the consent of a majority of the adult male members of the Uintah and White River Bands,[13] the Uintah Valley Reservation would be allotted and the unallotted lands would be "restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64.[14] After a deduction for the cost of allotting the lands, the proceeds from the sale of unallotted land were to be "used for the benefit of said Indians". Id. at 264. Finally, the Bands were to receive $70,064.48 "whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided."[15] Id. (Emphasis added).

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[12] The early efforts to open the Reservation, all of which failed because of the Utes' steadfast and unanimous opposition to accepting allotments and opening the Reservation, are discussed in Ute Indian Tribe v. Utah, 521 F.Supp. at 1111-14.

[13] Initially, the Uintah Valley Reservation was set aside for, and was settled by, the Uintah Band of Ute Indians. After an uprising on their reservation in Colorado, the members of the White River Band were removed to the Uintah Valley Reservation. Later, members of the Uncompahgre Band were permitted to purchase allotments on the Reservation. During the period in question (1902 - 1905), the Uncompahgre Band was not thought to have a legally protectable interest in the Uintah Valley Reservation.

[14] The relevant text of the 1902 Act is reproduced in State's Cert. Br. at 138a-140a.

[15] The payment was *not* to compensate the Tribe for opening the unallotted lands, but rather was:

> advanced as a compromise in settlement to [the Uintah and White River Utes' claim that they were entitled to the proceeds from the sale of allotments on the Uintah Valley Reservation to Uncompahgre Utes and for an earlier cession of land] and to remove all objection of the Indians to any arrangement for taking allotments and opening their reservation.

S.Rep. No. 951, 57th Cong., 1st Sess. 1, 3 (1902); LD 69.

Initially, President Theodore Roosevelt refused to sign the 1902 Act, in part because he found objectionable the Act's conditioning of the $70,064.48 payment upon the Indians' consenting to the restoration of their unallotted lands to the public domain. See Ute Indian Tribe v. Utah, supra, 521 F.Supp. at 1115-16. President Roosevelt signed the 1902 Act only after he received assurances that Congress would pass a joint resolution remedying his objections. See 521 F.Supp. at 1116.

In response to President Roosevelt's concerns, a Joint Resolution was passed on June 19, 1902.[16] Among other things, the Resolution provided that the $74,064.48:

> shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation . . .

J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744, 745 (1902).

The provisions of J.Res. 31 were incorporated into the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98.[17] In addition, Congress extended "the time for opening the reservation to public entry"; appropriated funds to survey the Reservation in preparation for making allotments thereon; and directed the Secretary of the Interior to:

> forthwith send an inspector to obtain the consent of the [Utes] to an allotment of their lands as directed by the Act of May [27, 1902], and if their consent, as therein provided, can not be obtained by June [1, 1903], then the Secretary of the Interior shall cause to be allotted to each [] Indian[] the quantity and character of land named and described in said Act.

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[16] The text of the Joint Resolution is reproduced in State's Cert. Br. at 140a-142a.

[17] The relevant text of the 1903 Act is reproduced in State's Cert. Br. at 142a-145a.

Id.

By the Indian Appropriations Act of 1904, Congress again extended "the time for opening the unallotted lands to public entry on the Uintah Reservation." See Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-208.[18]

By the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70, Congress provided that:

> the time for opening to public entry the unallotted lands on the Uintah Reservation having been fixed by law as the tenth day of March [1905], it is hereby provided that the time for opening of said reservation shall be extended to [September 1, 1905] . . . and the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and town-site laws of the United States,* and shall be opened to settlement and entry by proclamation of the President . . .

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069 (emphasis added).[19]

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[18] The text of the 1904 Act dealing with opening the Reservation is reproduced in State's Cert. Br. at 145a.

[19] The text of the 1905 Act dealing with the opening of the Reservation is reproduced in State's Cert. Br. at 145a-149a.

C. There Is No Statutory Language of Termination, Abolishment or Cession in the Act Opening the Uintah Valley Reservation to Settlement by Non-Indians

This Court permits a finding that Congress intended to disestablish a reservation when the act opening a reservation to settlement contains clear language of termination, abolishment or cession. See DeCoteau v. District County Court, 420 U.S. at 444. Nothing in the language of the Indian Appropriation Acts of 1902-1905 expressly terminated, abolished or ceded the reservation status of the unallotted lands. Rather, the Acts merely specified the substantive manner in which the unallotted lands on the Reservation were to be opened to entry and settlement.

In the 1902 Act, Congress provided that the unallotted lands on the Uintah Valley Reservation would be opened by restoring them to the public domain.[20] See

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[20] The Tribe does not address the effect, if any, that the 1902 Act's provision restoring the unallotted lands to the public domain would have had on the Reservation boundaries because that provision of the 1902 Act was amended by the 1905 Act. See Part D, infra. Throughout the federal and state court litigation, Utah maintained that the manner in which the 1902 Act planned to open the Reservation, standing alone, effected a disestablishment of the unallotted lands. Utah's argument ignores this Court's counsel that "the question of whether lands are in the public domain is separate from the question of intent to disestablish." See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604 n.27 (1977). Accordingly, the Tribe does not concede, as Utah has argued, that language restoring the unallotted lands to the public domain would have disestablished those lands had the language of the 1902 Act taken effect.

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64. In 1905, Congress explicitly rejected restoring the unallotted lands to the public domain, see Part D, infra, and provided, instead, that the unallotted lands would be opened only under the homestead and townsite laws.[21] See Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

With respect to the *manner* in which the unallotted lands were to be opened, the language in the 1905 Act closely resembles the language used in other legislation that this Court has held opened, but not did not disestablish, unallotted lands from the affected reservations.

For example, the Act of March 22, 1906, ch. 1126, 34 Stat. 80, provided that the unallotted lands of the Colville Reservation "shall be open to settlement and entry under the provisions of the homestead laws . . .", id. at § 3, and under the townsite laws, id. at § 11. Seymour v. Superintendent, 368 U.S. 351, 355 (1962). This Court concluded that the provision "did no more than to open the way for non-Indian settlers to own land on

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[21] Even the Utah Supreme Court acknowledged that "[t]he language of the 1905 Act shows that Congress intended to amend the 1902 Act [] by limiting 'the manner of opening the lands'." State v. Perank, State's Cert. Br. at 42a. What the Utah Supreme Court failed to comprehend, or factor into its analysis, is that the statutory language that specifies "the manner of opening the [unallotted] lands" is *precisely* the language that this Court looks at to determine whether Congress intended to disestablish, or merely open to settlement, the unallotted lands. See Ute Indian Tribe v. Utah, 521 F.Supp. at 1122-23.

the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." 368 U.S. at 356.

Similarly, the Act of June 17, 1892, ch. 120, 27 Stat. 52, declared the unallotted lands of the Klamath River Reservation "to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands . . ." Mattz v. Arnett, 412 U.S. 481, 495 (1973). This Court found that the provisions of the 1892 Act, "do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." 412 U.S. at 497.

Finally, the Act of May 29, 1908, ch. 218, 35 Stat. 460, authorized the Secretary of the Interior "to sell and dispose of" a portion of the Cheyenne River Reservation. Solem v. Bartlett, 465 U.S. 463, 472 (1984). This Court found that the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." 465 U.S. at 473. Accordingly, this Court found that the Cheyenne River Reservation had been opened but not disestablished. 465 U.S. at 474.

In sensitive obedience, see State's 10th Cir. Br. at 3; Rec. Vol. XIX, No. 2, to this Court's previous decisions interpreting language virtually identical to that used in the 1905 Act, the federal courts correctly concluded that Congress did *not* intend to disestablish the unallotted Uintah Valley lands when it opened the Reservation to

entry and settlement under the homestead and townsite laws. See 521 F.Supp. at 1123; 773 F.2d at 1089.

Because they found no indication in the language of the 1905 Act remotely resembling a Congressional intent to disestablish the Uintah Valley Reservation, the federal courts then looked to the legislative histories of the Indian Appropriations Acts of 1902-1905 and concluded that they did not contain the requisite *substantial* and *compelling* evidence, see Solem v. Bartlett, 465 U.S. at 470, of a congressional intent to disestablish the unallotted lands.

D. The Federal Courts Correctly Determined that the Legislative History Reflects that Congress Had Abandoned any Intent to Disestablish the Uintah Valley Reservation by 1905 and Consciously Chose to Merely Make the Unallotted Lands Available to Homestead and Townsite Entry

After an exhaustive recitation and analysis of the history of the opening of the Uintah Valley Reservation, see Ute Indian Tribe v. Utah, 521 F.Supp. at 1111-32, the federal district court determined that the 1905, rather than the 1902, Act opened, but did not disestablish, the Uintah Valley Reservation. See id. at 1154. By contrast, without referencing so much as a single word of the 1905 Act's legislative history, the Utah Supreme Court pronounced that nothing in that legislative history "indicates that Congress intended to repeal either the 1902 Act in total or the language of the 1902 Act restoring the unallotted lands to the public domain." See

State v. Perank, State's Cert. Br. at 41a. The Utah Supreme Court could not be more wrong.

The legislative history of the 1905 Act begins with the introduction of the Indian Appropriations bill for 1905-06, H.R. 17474, in the House of Representatives. The language referencing the Uintah Valley Reservation provided:

> [t]hat the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902 and March 3, 1903, and April 21, 1904, be, and the same is hereby extended to October 1, 1905: Provided, That so much of said land as will be under the provisions of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President of the United States . . .

39 Cong.Rec. 1180 (Jan. 21, 1905); LD 103 (emphasis added).[22]

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[22] Although H.R. 17474 refers to the 1902 Act as being operative and reiterates that the unallotted lands will be "restored to the public domain", the debate does not clearly indicate that the House intended to diminish the Reservation. See 39 Cong. Rec. at 1181-82 (extensive remarks by Utah Rep. Howell on the "opening" of the Reservation). More importantly, as in Mattz v. Arnett, 412 U.S. at 501-504, even if the *House* had intended to diminish the Reservation, the *Senate* rejected that notion.

Two weeks after the House passed H.R. 17474, Senator Smoot of Utah introduced S. 6867, which provided:

> [t]hat the time *for opening to public entry* the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the *manner of opening* such lands for settlement and entry, and for disposing of the same shall be as follows: That *the said unallotted lands*, excepting such tracts as may have been set aside as national forest reserve, *shall be disposed of under the general provisions of the homestead and townsite laws of the United States*; . . .

S. 6897, 58th Cong., 3d Sess.; LD 97 at 1-2 (emphasis added). In hearings held a few days later, the inclusion of S. 6867 in the Indian Appropriations bill was the subject of a colloquy among Senators Kearns and Smoot of Utah and Senator Teller of Colorado.[23] Senator Teller insisted upon the unallotted lands being restricted to settlement under the homestead and townsite laws. See "Indian Appropriations Bill, 1906" Hearings, Subcomm. of the

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[23] Senator Teller was a long-time, outspoken critic of the allotment and surplus lands policy. On an earlier allotment bill, he commented:

> This is a bill that, in my judgment, ought to be entitled, "A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth," because, in my view, that is the result of this kind of legislation . . .

See 11 Cong. Rec. 783, 934 (Jan. 20, 1881).

Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess., at 29-30 (1905); LD 100.

As the Senate continued to debate the Indian Appropriations bill, the Commissioner of the General Land Office (which administered the public land laws) was asked to comment upon S. 6897. The Commissioner's response was only one of two documents that referenced the opening of the Uintah Valley Reservation in the report submitted by the Senate Committee on Indian Affairs on the Indian Appropriations bill. See S.Rep. No. 4240, 58th Cong., 3d Sess. 1; LD 102. In his letter, the Commissioner opined that "*the proposed bill [S. 6897] will repeal the act of May 27, 1902.*" Id.; LD 102 at 15 (emphasis added).

H.R. 17474 was amended, without debate, on the Senate floor to substitute S. 6897 for the House provision dealing with the manner in which the Uintah Valley Reservation was to be opened. 39 Cong. Rec. 3522 (Feb. 27, 1905); LD 103. The bill was referred to a conference committee. Again, without debate, the conference report struck the House version, substituting the Senate version which abandoned any language that would have restored the unallotted Uintah Valley lands to the public domain. See 39 Cong. Rec. at 3919; LD 103. The conference bill was enacted as the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

The legislative history reflects that, by conscious decision, Congress amended the manner in which it intended to open the Reservation under the 1902 Act. Instead of restoring the unallotted Uintah Valley lands to the public domain, Congress substituted language that

merely opened the Reservation to settlement and entry under the homestead and townsite laws. In addition, the 1905 Act deleted reference to the 1902 Act as the operative statute and declared "this [the 1905] Act" to be the opening statute. See Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069. By these amendments, Congress clearly altered the manner in which the unallotted lands of the Uintah Valley Reservation were to be opened.[24]

Despite the clear legislative history to the contrary, the Utah Supreme Court adduced that, because Congress did not expressly state on the face of the 1905 Act that it was repealing the "public domain" feature of the 1902 Act, the intent of the restoration language carried through to the 1905 Act. See State v. Perank, State's Cert. Br. at 41a-42a. However, after the court acknowledged that "the language of the 1905 Act shows that Congress intended to amend the 1902 Act by limiting 'the manner of opening the lands'," id., it *should* have analyzed whether the 1905 Act amended the 1902 Act to such an

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[24] The legislative history of the 1905 Act parallels that of the 1892 Act which this Court held did not effect a disestablishment of the Klamath River Reservation. As in Mattz, a House effort that may have disestablished the Reservation failed to accomplish its objectives when the Senate bill's language was substituted for that of the House. Like the Act in Mattz, the Senate version of what became the Act of March 3, 1905, allowed entry of the opened reservation only under the homestead and other specified laws. Compare Mattz v. Arnett, 412 U.S. at 501-504. Here, as this Court pointed out in Mattz, "Congress was fully aware of the means by which termination could be effected." Id. at 504. But clear termination language was *not* employed in the 1905 Act.

extent as to evince a Congressional intent to abandon any plan Congress may have had to diminish the Reservation boundaries.

The Acts in dispute and the language in dispute address the same subject, to wit: the substantive manner in which the Uintah Valley Reservation was to be opened. If, as Utah argues, the use of language restoring the unallotted lands to the public domain effects a disestablishment and if, as this Court has held in the past, e.g., Seymour v. Superintendent, 368 U.S. at 356, language merely opening the unallotted lands to settlement under the homestead laws does not effect a disestablishment, then the 1902 and 1905 Acts irreconcilably conflict with one another. The "cardinal rule . . . that repeals by implication are not favored", see Morton v. Mancari, 417 U.S. 535, 549-50 (1974), is overcome when a later statute "'expressly contradict[s] the original act'" and a construction that the earlier statute was impliedly repealed "'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all'". See Traynor v. Turnage, 485 U.S. 535, 547 (1988) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)).

In 1905, Congress deliberately rejected the manner in which the Reservation was to have been opened under the 1902 Act. For Congress' deliberate act to have any meaning, the provision of the 1902 Act specifying the manner in which the Reservation was to have been opened must be held to have been repealed by the conflicting provision in the 1905 Act. This Court should adhere to almost 30 years of Indian-law jurisprudence and find that the 1905-Act language opening the unallotted

Uintah Valley lands to settlement by non-Indians under the homestead and townsite laws did *not* disestablish those lands from the Reservation.[25]

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[25] In the past, this Court has found evidence of the Indians' consent to be probative in establishing a "shared understanding" between Congress and the Indians that the affected reservation would be diminished by a particular surplus land Act. E.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 591; DeCoteau v. District County Court, 420 U.S. at 436.

Pursuant to the Act of March 3, 1903, ch. 994, 32 Stat. 982, 997, James McLaughlin was dispatched to the Uintah Valley Reservation to obtain the Utes' consent to the allotment and opening of the Uintah Valley Reservation. After meeting with the Indian inspector for five consecutive days, only 82 of the 280 adult male Utes were persuaded to consent to allotment. See Consent Form of Uintah and White River Utes (May 23, 1903); LD 164. Even those who consented to allotment were opposed to opening the Reservation, and executed the Consent Form as a gesture of good faith to the government. See H.Doc. 33 at 7, 58th Cong., 1st Sess. (Dec. 1, 1903); LD 92.

The Utes' unanimous opposition to opening the Reservation negates any finding that they "shared" an understanding that the Reservation would be diminished. Moreover, McLaughlin's discussions with the Utes focused on opening the Reservation pursuant to the *manner* prescribed in the 1902 Act. See id. at 1. As discussed above, the Reservation was opened in the *manner* prescribed in the 1905 Act. Therefore, any discussions between McLaughlin and the Utes were irrelevant except to the extent, if any, that they influenced Congress to abandon any intent it may have had to disestablish the Reservation.

E. The Circumstances Surrounding the Opening of the Reservation Are Grossly Inconsistent and Must Be Resolved in Favor of a Finding that the Unallotted Lands Were Not Disestablished

After finding that the statutory language and legislative history of the 1905 Act did not indicate a Congressional intent to disestablish the unallotted Uintah Valley lands from the Reservation, the federal courts examined the subsequent treatment accorded the unallotted lands by Congress and the executive branch, see 521 F.Supp. at 1132-36, 1142-49; 773 F.2d 1088-89, and concluded that they did not disclose any contrary legislative intent.

On July 14, 1905, President Theodore Roosevelt issued a proclamation specifying the procedural manner in which the Uintah Valley Reservation was to be opened. See Presidential Proclamation of July 14, 1905, 34 Stat. 3119; LD 108.[26] The Utah Supreme Court found that because the Proclamation "quot[es] the language from the 1902 Act that 'restored' the unallotted land to 'the public' domain'", see State v. Perank, State's 10th Cir. Br. at 46a, the President deemed the provision to be operative statutory language that remained in effect. Id. However, the quotation to the "restoration" language appears in the first paragraph of the Proclamation, in the context of citing the statutes that authorized the President to issue the Proclamation in the first place. The "restoration" language is *not* quoted as specifying the

[26] The Presidential Proclamation is reproduced in State's Cert. Br. at 155a-162a.

substantive manner in which the Reservation was to be opened.

In referencing the *substantive manner* in which the Reservation was to be opened, the Proclamation tracks the language of the 1905 Act, providing:

> *that all the unallotted lands in said reservation*, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, *will on and after the 28th day of August, 1905, in the matter hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States. . .*

34 Stat. 3119 (emphasis added). Thus, the operative language of the Presidential Proclamation acknowledges that the substantive manner of opening the unallotted lands on the Uintah Valley Reservation was amended by the 1905 Act, and was restricted to entry under the homestead and townsite laws.[27]

[27] Even if the President were under the mistaken belief that the 1902 Act prescribed the manner in which the Reservation was to be opened, that belief is entitled to no weight, given that the legislative history clearly reflects that, in 1905, Congress deliberately rejected restoring the lands to the public domain. See Public Employees Retirement System v. Betts, 492 U.S. 158, 171 (1989) (even a contemporaneous and longstanding executive interpretation that conflicts with the plain language of a statute is entitled to no deference).

Perhaps not surprisingly, given that the United States and Tribe were not parties to the proceedings, in discussing Congress' subsequent treatment of the unallotted lands, the Utah Supreme Court mentioned only subsequent Acts and legislative materials in which the Reservation was referred to in the past tense. See State v. Perank, State's Cert. Br. at 48a-52a. In contrast, the federal district court carefully analyzed the evidence presented by the United States, the Tribe and the State on the subsequent treatment accorded the Reservation by Congress, see 521 F.Supp. at 1132-36, including those statutes and legislative materials in which the Reservation was referred to in the present tense. Id. at 1134. After reviewing *all* of the relevant evidence, the district court concluded that it could:

> discern no clear congressional intent to disestablish the unallotted lands of the Uintah [Valley] Reservation evidenced by past-tense, 'former' references. Not only are the references grossly inconsistent when considered together, they arise from a specific source, the Utah delegation, ca. 1906, and they virtually cease after the retirement of Senator Southerland from the Senate in 1917, and furthermore, they are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905. Compare United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 590-593 (1957).

521 F.Supp. at 1135. Accordingly, the district court concluded that the subsequent treatment did not indicate

that Congress believed that the unallotted lands had been disestablished. See id.

Just as it overlooked Congressional references to the Reservation in the present tense, the Utah Supreme Court overlooked the treatment accorded the Reservation by the executive branch when such treatment *affirmed* the Reservation's continuing existence. See 521 F.Supp. at 1142-45. Instead, the State court addressed only those actions by the executive branch that supported a conclusion that the unallotted lands had been disestablished. See State v. Perank, State's Cert. Br. at 52a-55a. Similarly, the Utah Supreme Court completely ignored the jurisdictional history of the Reservation, which, after being reviewed at length by the federal district court, see 521 F.Supp. at 1145-50, was characterized as being "[certainly] not one of 'unquestioned' exercise of state authority." See 521 F.Supp. at 1146.[28]

While it may have been easier for the Utah Supreme Court to ignore the inconsistencies in the subsequent treatment of the Reservation, this Court does not endorse such intellectual dishonesty. See Solem v. Bartlett, 465 U.S. at 475 (discussing evidence which made it more difficult for the Court to conclude that the Cheyenne River Reservation had not been disestablished).

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[28] Because of space limitations, the Tribe is unable to discuss all of the evidence on subsequent treatment of the unallotted lands that was presented to and discussed by the federal district court. The federal district courts' comprehensive analysis of the evidence presented by the Ute Indian Tribe parties appears at 521 F.Supp. 1124-36, 1142-50.

More importantly, by failing to mention the inconsistencies, the Utah Supreme Court created the impression that the subsequent treatment accorded the Reservation by Congress and the executive branch clearly and unambiguously indicated that the Reservation had been diminished. However, as acknowledged by the federal district court and as disclosed by *the totality* of evidence, the subsequent treatment of the Reservation *was* "grossly inconsistent". See 521 F.Supp. at 1135. As this Court has acknowledged on numerous occasions, doubtful expressions must be resolved in favor of the Indians. E.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973). Accordingly, the gross inconsistencies in the subsequent treatment accorded the unallotted lands must be resolved with a finding that the unallotted Uintah Valley lands were *not* disestablished from the Reservation.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the Utah Supreme Court and expressly affirm that the unallotted Uintah Valley lands were opened, but not disestablished from, the Reservation and that the Reservation boundaries remain undiminished.

Respectfully submitted,

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